BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LESLIE N. WALKER Claimant	)	
VS.	)	
CENTURY MANUFACTURING, INC. Respondent	)	Docket No. 1,038,041
AND	)	
TRAVELERS INDEMNITY CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 21, 2009, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on December 18, 2009. Phillip R. Fields, of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent and that he gave respondent timely notice of his accident. The ALJ authorized Dr. Patrick Do as claimant's authorized treating physician and ordered all medical paid.

The Board has considered the record and adopted the stipulations listed in the Award. Although not listed by the ALJ in his recitation of the record in the Award, during oral argument to the Board the parties agreed that the record also contains the April 8, 2008, report of Dr. Do from his court-ordered independent medical examination of claimant.

ISSUES

Respondent argues that claimant did not suffer personal injury by an accident that arose out of and in the course of his employment and asserts that his alleged injury was the result of the normal activities of day-to-day living. Further, respondent argues that claimant failed to give respondent timely notice of his alleged work-related injury and that he did not have just cause to extend the period for giving notice beyond 10 days.

Claimant argues that he suffered personal injury that arose out of and in the course of his employment with respondent, that his injury was not caused by the normal activities of day-to-day living, and that he had just cause to delay notifying respondent of his injury.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of his employment with respondent?

(2) Does claimant suffer disability as the result of the normal activities of day-to-day living?

(3) Did claimant give respondent timely notice of his alleged accident?

FINDINGS OF FACT

Claimant is an inmate at the El Dorado Correctional Facility. He was employed by respondent, a private manufacturing company whose facility is within the prison grounds. Claimant worked as a janitor and, in addition, helped load and unload trucks. On the afternoon of Friday, August 17, 2007, claimant helped unload a truck, after which he went to one of the bathrooms to clean. He had swept the floor and was in a bent-over position sweeping the dust into a dustpan. As he started to straighten up, he twisted to empty the contents of the dustpan into the trash. While his body was in a bent over and twisted position, either the dust or cleaning chemicals caused him to sneeze. As he sneezed, he felt a pop in the middle of his low back around the belt line. Claimant testified that he sneezed a lot at work because of the resin, rubbing compound, cleaning chemicals, and dust at the plant.

Claimant testified that he was not in too much pain on the date of his injury. He thought he had pulled something but finished his shift and then went back to his cell. The next morning, Saturday, August 18, he was unable to get out of bed because of the pain. He realized that it was because of the pop he had felt in his back the day before. As he was scheduled to work that day, he asked some coworkers, fellow inmates, to tell his supervisor, Kevin Lowmaster, that he was not going to be at work because he had hurt his back while working. He spent all day in bed except when he got up to go to the bathroom, and then he had to have help from his cellmate.

By the next Monday, August 20, claimant still had low back pain, but he also started hurting in his hips and down both legs, mainly the left. Claimant asked his cellmate, Jon Goss, who also worked for respondent, to tell Mr. Lowmaster that he had been hurt at work and that he would not be at work. When Mr. Goss returned from work Monday evening, he related to claimant that he had given that information to Mr. Lowmaster.

Claimant testified that on Monday, he sent a request to the clinic to be seen because of his back pain. He said he was seen the next day, Tuesday, August 21. He spoke with a nurse at the clinic, who scheduled him to be seen by a physician's assistant on August 27. The physician's assistant placed him on a seven-day lay-in and gave him restrictions of no overhead work, no standing stationary for more than 30 minutes, and no bending, squatting, stooping, or lifting.

Claimant made a second request for medical treatment by the prison clinic on September 2, 2007, because his back was not better. He returned to the prison clinic on September 5, 2007, but he was told that because his pain had been caused by an injury at work, the clinic would not treat him. Claimant was directed to get treatment from respondent because it was a workers compensation issue. Claimant then spoke with Jim McKay, the head supervisor at respondent, and requested medical treatment. Mr. McKay scheduled an appointment for claimant to be seen by Dr. Jon Kirkpatrick, and claimant was seen by Dr. Kirkpatrick on September 13, 2007. Dr. Kirkpatrick allowed claimant to return to work, but gave him a 10-pound lifting restriction. Sometime after that visit, respondent told claimant that it would not authorize further treatment, and claimant received no treatment until after a preliminary hearing, when Dr. Patrick Do was authorized by the ALJ. Claimant received treatment from Dr. Do until a Board Member, on respondent's appeal from the ALJ's preliminary hearing order, found that claimant had failed to prove his injuries arose out of and in the course of his employment with respondent.

Claimant returned to work on September 18, 2007, but he was unable to work full days because of his pain. Then, on October 10, claimant was convicted of theft and hoarding medications. As a result, he lost his privilege of working at respondent. He testified that he would be eligible to return to work on October 8, 2008, but doubted he would be rehired because respondent had reduced the number of inmates they had working at the plant.

There was no evidence introduced that claimant had any previous problems with his back. He testified he did not play basketball or other sports in the prison. He thinks his injury was the result of a combination of his back being tight from unloading the truck, the fact that his body was in a bad position, and the dust making him sneeze.

Mr. Lowmaster testified that he was claimant's supervisor at respondent. He confirmed that claimant's job at respondent required him to clean areas of the plant, including two bathrooms, as well as to load and unload trucks. He said that trucks came in every day for loading or unloading. He testified that although respondent's plant was

cleaner than most, there was some dust. He also stated that claimant, in performing his janitorial duties, would use some cleaning chemicals. He was not aware of claimant sneezing as he performed any aspect of his job, and no other employee has complained to him of a problem with dust or chemicals causing sneezing. He said that respondent does not require employees to wear masks, but masks are available. He said that the current janitor picks up a mask every morning.

Mr. Lowmaster could not remember whether he had been told by any of claimant's coworkers that claimant was not at work because he had injured his back at work on August 17, 2007. He said that at times, inmates will remain in their cells and not show up to work because they were sick, and he would get that information through other inmates. Mr. Lowmaster also said that respondent did not have an informational bulletin board that explained to workers about how to file a workers compensation claim. There is no published notice about workers compensation that inmates can see to give them information on how to file a workers compensation claim.

Claimant was examined by orthopedic surgeon, Pat Do, M.D., on April 8, 2008, at the request of the ALJ. Dr. Do diagnosed claimant as having back pain with possible L5-S1 nerve irritation and left S1 joint dysfunction with spasms. Dr. Do reported that he considered the back injury to be work related. He recommended that claimant receive additional treatment.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

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[1] K.S.A. 2009 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

K.S.A. 2009 Supp. 44-508(d) defines "accident" in part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2009 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann,*[4] denied workers compensation benefits, holding that

> physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not

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[3] *Id.* at 278.

[4] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

> compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."[5] The evidence was

> that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .
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> . . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.[6]

Similarly, in *Martin,*[7] the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

More recently, the Kansas Court of Appeals in *Johnson*[8] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[9]

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[5] *Id.* at 736.

[6] *Id.* at 738-39.

[7] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

[8] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[9] *Id.* at 788.

Claimant injured his back on August 17, 2007, as a result of the repetitive lifting activities he was performing for respondent followed by bending and twisting while sweeping. Also, claimant sneezed while in a bent over and twisted position. These work tasks were not activities of day-to-day living, nor is claimant's disability attributable to either a preexisting condition or activities that claimant performed outside of work. Claimant's disability is directly related to his employment.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually;
(2) whether the employee is aware he or she has sustained an accident or an injury on the job;
(3) the nature and history of claimant's symptoms; and
(4) whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

K.S.A. 2009 Supp. 60-206(a) states:

> In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to

> run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state, or observed as a holiday by order of the supreme court. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply. [10]

Claimant initially was not in a great amount of pain. He was able to finish his shift. The next morning, however, he was unable to get out of bed due to back pain. Claimant immediately related his pain to his work activities the day before and asked a coworker to inform his supervisor of his injury and of his inability to report to work that day. The following day, claimant was again unable to work due to pain. He asked his cellmate, Mr. Goss, to inform their supervisor, Mr. Lowmaster, that he had been hurt at work and would not be able to work. Mr. Goss later advised claimant that he had done as claimant had asked. Claimant was taken off work by a physician's assistant at the prison clinic. Claimant reported his injury as work related to the clinic and, as a result, was denied further treatment. Claimant was eventually referred for medical treatment by respondent. It is not clear whether the conversation with Mr. McKay that led to this referral occurred within 10 working days of claimant's accident, but it clearly occurred within 75 days as claimant was seen by Dr. Kirkpatrick on September 13, 2007. Nevertheless, under the circumstances of this case, where claimant believed his coworkers had reported his work-related injury within 10 days to Mr. Lowmaster, who does not recall being so advised but also does not deny it, the Board finds just cause for extending claimant's time to report his accident to 75 days.

CONCLUSION

(1) Claimant suffered personal injury by an accident that arose out of and in the course of his employment with respondent.

(2) Claimant's disability is not the result of his normal activities of day-to-day living.

(3) Claimant gave respondent timely notice of his accident.

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[10] See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 21, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge